No. [redacted]

Supreme Court of the United States

October Term, [redacted] 1925

CHARLES HAMMER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI WITH MOTION OF SUPERSEDEAS

ROBERT H. ELDER,
Counsel for Petitioner.

The Law Print, 37 Maiden Lane, N. Y. [redacted] 1925

SUBJECTS.

DISCUSSION.

AUTHORITIES.

Petition for Writ of Certiorari.

Supreme Court of the United States

OCTOBER TERM, 1924.

CHARLES HAMMER,
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against

UNITED STATES OF AMERICA,
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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

This, the petition of Charles Hammer, respectfully shows:

1. This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

History of the Case.

2. The case arose in the United States District Court for the Southern District of New York where petitioner was indicted of subornation of perjury.

The indictment, in three counts, charged him with suborning three persons to testify falsely before a referee in bankruptcy. The case was tried before District Judge Edwin L. Garvin and a jury. Two counts were dismissed because no evidence tended to sustain them. The remaining count was submitted to the jury and it rendered a verdict of guilty. The judgment of the court was that petitioner be imprisoned in the penitentiary at Atlanta for one year and ten months. On error to the Circuit Court of Appeals for the Second Circuit the judgment of conviction was affirmed. The judgment of the District Court was rendered May 19, 1924. The opinion of the Circuit Court of Appeals was handed down March 2, 1925, and its order of affirmance entered March 9, 1925.

The Questions of General Interest Involved.

3. The accusation of which petitioner was convicted was that he procured Trinz to testify falsely in a bankruptcy proceeding. The indictment was for subornation of perjury, and was so treated on the trial and in the Circuit Court of Appeals. No evidence was offered to show the testimony of Trinz in bankruptcy to be false except the statement of Trinz himself, asserting that what he said in bankruptcy was false, but what he said on the trial of petitioner was true. These questions therefore arose:

A. *Does the taking of a false oath in bankruptcy constitute perjury, in view of the fact that the offense is specially defined by the Bankruptcy Act and a special punishment and a special term of limitation there provided? The distinction between*

perjury and false oaths not amounting to perjury is a very old one and has been steadily recognized in the statutes of the United States. The decision of the Circuit Court of Appeals for the Second Circuit, deciding that the taking of such an oath is perjury, is not only contrary to its own prior decision (*Kahn* v. *U. S.*, 214 Fed. 54), *but is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit* (*Ulmer* v. *U. S.*, 219 Fed. 641, 647-648) *and the Circuit Court of Appeals for the Eighth Circuit* (*Rosenthal* v. *U. S.*, 248 Fed. 684, 685).

If the court below erred in deciding this point the error is vital, since there can be no subornation of perjury unless perjury itself be committed.

B. *There was no evidence offered to show the falsity of the oath which petitioner was accused of having suborned, except the testimony of the witness himself. The rule that in prosecution for perjury the falsity of the oath must be proved by two witnesses, or by one witness and corroborating circumstances, and that the uncorroborated testimony of one witness is never enough, is too well fixed in our law to be questioned. The Circuit Court of Appeals did not question it, but while conceding that it applied in prosecution of the* PERJURER, *they denied that it applied in prosecution of the* SUBORNER. *This distinction is contrary to the common law of England and contrary to the decisions of all of the states of this union, excepting Missouri alone. We believe it to be contrary to good logic. The question is of public interest because it is fundamental to the law of subornation of perjury and is certain to arise again.*

If the Circuit Court of Appeals erred in deciding this point the error is vital, because the point was raised both by motion to acquit and by proper request for an instruction. Indeed, it is obvious and not open to dispute that the testimony of the witness Trinz, who said he swore falsely before the referee in bankruptcy, was uncorroborated.

4. Because the Circuit Court of Appeals for the Second Circuit erred in deciding the foregoing questions, and because they are important, as will be more fully expounded in the brief accompanying this petition, petitioner prays that a writ of certiorari issue to the Circuit Court of Appeals for the Second Circuit to the end that the errors aforesaid may be corrected.

Dated, March 13, 1925.

ROBERT H. ELDER,
Counsel for Petitioner.

I certify that, in my opinion, the foregoing petition is well founded and that it is not interposed for the purpose of delay.

ROBERT H. ELDER,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1924.

CHARLES HAMMER,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. Petitioner was indicted of the crime of subornation of perjury in the United States Distrct Court for the Southern District of New York. The bill alleged three offenses, viz., the suborning of three persons to testify falsely in proceedings before a referee in bankruptcy (R., pp. 1-18). On the trial Judge Garvin directed a verdict as to the first and third counts because of lack of evidence to sustain them (R., p. 60). The sec-

ond count he submitted to the jury and it returned a verdict of guilty. Petitioner was thereupon sentenced to imprisonment for a term of one year and ten months (R., p. 79).

The case in the District Court is reported as *United States* v. *Hammer*, 299 Fed. 1011. In the Circuit Court of Appeals it is not yet reported.

POINTS.

I.

The decision of the Circuit Court of Appeals holding that the taking of a false oath in a bankruptcy proceeding is perjury is erroneous, and is in conflict with decisions of the Circuit Courts of Appeal for the Sixth and Eighth Circuits, and is opposed to an earlier decision of its own.

(A) *The question.*

Perjury and subornation of perjury are defined *Crim. Code*, sec. 125:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than

two thousand dollars and imprisoned not more than five years."

Crim. Code, sec. 126:

"Whoever shall procure another to commit any perjury is guilty of subornation of perjury and punishable as in the preceding section prescribed."

The Bankruptcy Act (§29b [2]) provides:

"A person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently,

* * * * * *

"Made a false oath or account in, or in relation to, any proceeding in bankruptcy."

Is a person who commits "*the* offense" of making a false oath "in or in relation to any proceeding in bankruptcy" guilty of the offense defined in Crim. Code, §125 or is he guilty of the *different* offense defined in Bankruptcy Law, §29b?

The distinction between perjury and false oaths not amounting to perjury is classical.

2 *Bish. New Crim. Law*, §1014.
30 *Cyc.* 1400-1401.
U. S. v. *Elliott*, 3 Mason 156.

The Congress of the United States has not infrequently defined instances where false oaths are punishable, but *not* as *perjury*. For example:

Crim. Code, §80 (naturalization).
36 *Stat.* 1015, ch. 200 (national parks).
40 *Stat.* 441, §200 (2) (military service affidavit).

That Congress, in enacting §29b of the Bankruptcy Act, intended to create a *new* offense and not a new species of the existing crime of perjury is indicated by this:

(a) The act *defines* the offense and *prescribes the punishment* for it. It is a rule of interpretation that when a later *specific* statute defines an offense and prescribes the punishment for it, such offense is deemed to be taken without the scope of an earlier *general* statute.

U. S. v. *Tynen,* 78 U. S. (11 Wall.) 88.

(b) The *language* chosen indicates a purpose to define a new offense. It is:

> "A person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently,
>
> (1) concealed while a bankrupt, * * *
>
> (2) made a false oath or account * * *
>
> (3) presented under oath any false claim * * *
>
> (4) received any material amount or property from the bankrupt, * * *
>
> (5) extorted or attempted to extort any money or property * * *"

That is, the language indicates that the draughtsman considered these five varieties of misconduct in bankruptcy as different forms of *the same offense.* It is inconsistent with an intent to make part of "the offense" so defined identical with the crime defined in Crim. Code, §125, viz., perjury.

In section 29d the period of limitation is defined and there the language chosen is:

> "A person shall not be prosecuted for any offense *arising under this act* unless * * *"

Which shows that the draughtsman considered false swearing in bankruptcy as an offense *arising* under the Bankruptcy Act, and not one arising under the act defining perjury.

(c) Whereas *materiality* is essential to perjury, it is not an element of a false oath in bankruptcy.

(d) Whereas the punishment for perjury is imprisonment for not more than *five* years *plus* a fine of not more than $2,000 (Crim. Code, §125), the punishment for false swearing in bankruptcy is imprisonment for not more than *two* years *without* a fine; and whereas the term of limitation for prosecution for perjury is *three* years (R. S. 1044), the term of limitation for prosecution for false swearing in bankruptcy is *one* year (Bankruptcy Act, §29d).

(B) *The conflicting decisions of the Circuit Courts of Appeals.*

In harmony with the decision below are:

Wechsler v. *U. S.*, 158 Fed. 579, the first decision of the Circuit Court of Appeals for the Second Circuit on the point which was followed in the decision below as stating the law of the Second Circuit (R., p. 128). There the court reached the conclusion:

> "The two sections may be construed together providing a stated penalty for the crime of false swearing generally, with the

> proviso that, when such false swearing occurs in a bankruptcy proceeding, the offender, upon conviction, shall be subjected to a different penalty" (p. 581).

Epstein v. *U. S.*, 196 Fed. 354, a decision of the Circuit Court of Appeals for the Seventh Circuit. There it was said:

> "In our judgment false swearing in bankruptcy proceedings is perjury, nothing more, nothing less" (p. 356).

In conflict with the decision below are:

Kahn v. *U. S.*, 214 Fed. 54, an earlier decision of the Circuit Court of Appeals for the Second Circuit. In deciding this cause the court explained the language quoted below as being "some unguarded expressions" (R., p. 128):

> "It is said, however, that their falsity [of the statements assigned as perjury] was not shown by the clear and convincing proof necessary in perjury cases, which defendant maintains requires the direct testimony of at least one witness supported by proof of corroborating circumstances. It must be remembered that this prosecution is brought under a special section of the Bankruptcy Act, making it an offense, punishable by imprisonment for a period not exceeding two years, to make a false oath, knowingly and fraudulently in a proceeding in bankruptcy. Of course, broadly stated, this is a perjury statute, but we should not overlook the fact that at the time the present Bankruptcy Act was passed, there was on our statute books, and had been for over a hundred years, a general perjury statute (now sec. 125 of the Criminal Code. * * * which provides

that a person found guilty under its provisions 'shall be fined not more than $2,000 and imprisoned for not more than five years.'

If Congress regarded the crime of false swearing in bankruptcy proceedings as equal in enormity to the crime of perjury, what necessity was there for sec. 29b (2) at all? That fact that the word *perjury* [sic] does not appear in the later act [Bankruptcy Act] and that the term of imprisonment was reduced from five years to two years, and that the $2,000 fine omitted altogether, makes it clear that Congress in the Bankruptcy Act, was dealing with a crime not, in its judgment, so aggravated as the crime of perjury" (p. 56).

Ulmer v. *U. S.*, 219 Fed. 641, a decision of the Circuit Court of Appeals for the Sixth Circuit. There it was said:

"If the indictment and sentence could rightfully be treated as under section 125 of the Penal Code * * * the error inherent in three convictions and three sentences for one crime might be immaterial, * * *; but the prosecution cannot be so considered. Not only does the indictment specify that it is founded on section 29 of the Bankruptcy Act (a consideration not controlling—*Williams* v. *U. S.*, 168 U. S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509), but it is industriously drawn in the language of the Bankruptcy Act, §29b (2), so as to charge that Ulmer 'made a false oath in and in relation to a proceeding in bankruptcy.' We approve and adopt the holding of the Second Circuit Court of Appeals in *Wechsler* v. *U. S.*, 158 Fed. 579, 86 C. C. A. 37, which makes it necessary to regard this prosecution as one under the Bankruptcy Act only, and forbids going to section 125 of the Penal Code for

> support. From this view, and from the conclusion that only one offense was committed, it follows that imprisonment for more than two years specified in section 29b was unauthorized" (pp. 647-648).

Rosenthal v. *U. S.*, 248 Fed. 684, a decision of the Circuit Court of Appeals for the Eighth Circuit. There it was said:

> "The defendant, plaintiff in error, was indicted in two counts for false swearing, in a proceeding in bankruptcy, before the referee in bankruptcy. Each of the counts is for the same alleged offense; one count being evidently drawn under section 29b (2) of the Bankruptcy Act, and the other under section 125 of the Penal Code. There can only be one prosecution and conviction for one offense, and Congress undoubtedly was of the opinion that false swearing in bankruptcy proceedings is not equal in enormity to the crime of perjury, as the punishment for false swearing in a proceeding in bankruptcy is less severe, and the time within which the prosecution must be instituted two years less than that for the crime of perjury under section 125 of the Penal Code. It was so held in *Wechsler* v. *U. S.*, 158 Fed. 579, 86 C. C. A. 37; *Kahn* v. *U. S.*, 214 U. S. 54, 130 C. C. A. 494; *Ulmer* v. *United States*, 219 Fed. 641, 134 C. C. A. 127. We therefore hold that the defendant could only be prosecuted under section 29b (2) of the Bankruptcy Act, and not under section 125 of the Penal Code" (p. 685).

(C) *Petitioner was erroneously convicted of subornation of perjury if the oath suborned did not amount to perjury.*

There is no real distinction between perjury and subornation of perjury as is expounded in the next point. Anyhow, there can be no subornation of perjury unless *perjury* be committed.

> *Epstein* v. *U. S.*, 196 Fed. 354, 356.
> *U. S.* v. *Wilcox*, 4 Blatch. 393.
> *People* v. *Teal*, 196 N. Y. 372.
> *Rex* v. *Hinton*, 3 Mod. 122; 87 Reprint 78.
> *Hawkins P. C.*, bk. 1, ch. 69, sec. 10.
> 1 *Russell Law of Crimes* (7th Eng. & 1st Can. Ed.) 527.

> "There being false swearings which are not perjuries, a procuring of their commission is not subornation of perjury" (2 *Bishop New Crim. Law*, §1197a).

(D) *The point is necessarily involved.*

It appears on the face of the indictment that the alleged false oath was taken in bankruptcy (R., pp. 8-12). The court ruled during the course of the trial that the prosecution was one for subornation of perjury (R., pp. 74-75). Motion to quash (R., pp. 62, 63) and motion to arrest judgment (R., p. 234) on this ground were denied, over exception.

It appeared by the evidence that the oath was taken in a bankruptcy proceeding (R., pp. 22-29). Motion to acquit on this ground was denied, over exception (R., pp. 62-63).

The errors are assigned (R., pp. 107-108).

II.

The Circuit Court of Appeals recognized that it is the rule that in prosecution for *perjury* the falsity of the oath must be proved by the direct testimony of two witnesses or by the testimony of one witness and corroborating circumstances, but they decided the rule does not apply in prosecution for *subornation of perjury*. This distinction is erroneous and is contrary to the settled law of England and contrary to all American decisions excepting those in Missouri.

A. *The question.*

The argument of the Circuit Court of Appeals appears at pages 130-134 of the record. We submit it is erroneous for these reasons.

At common law perjury was a *misdemeanor*, and all parties to misdemeanors were principals and were not classified as principals and accessories. Therefore the distinction between perjury and subornation of perjury was never more than *nominal* because the suborner, being accessory to the perjury, was guilty of the perjury itself: "perjury perpetrated by procuring another to do it [although] * * * honored in our law by the separate name of *subornation of perjury*, it is, in fact, *mere perjury*" (2 *Bishop New Crim. Law*, §1056).

> "The offense [subornation of perjury] is in substance the same as counselling or procuring the commission of the misdemeanor

> of perjury, and is punishable in the same manner as the principal offense under sect. 8 of the Accessories &c. Act. 1861"* (1 *Russell Law of Crimes* [7th Eng. & 1st Can. Ed.] 527).

Even where there is a statute separately defining subornation of perjury the suborner may be prosecuted for the perjury itself.

> *Comm.* v. *Smith*, 93 Mass (11 Allen), 243, 256-257.

Indeed, the perjurer and the suborner may be indicted and tried *together*, because the offense which they commit is the *same*.

> *Comm.* v. *Devine*, 155 Mass. 224, 226.
> 1 *Russell Law of Crimes* (7th Eng. & 1st Can. Ed.) 527.
> 30 *Cyc.* 1440.

Therefore it would be *illogical*, it would be *unreasonable* if the falsity of the oath could be proved by less evidence against the suborner than against the witness himself, particularly if they were tried *together*. Such is not the law. The *true* rule is that no matter against whom the prosecution is directed the *falsity* of the oath must be proved by something better than the testimony of a single witness, but *other* facts, such as the taking of the oath or its procurement by the suborner, can be proved like any other fact.

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* An act but declaratory of the common law (1 Russell Law of Crimes [7th Eng. and 1st Can. Ed.], 138).

English Law.

We have been unable to find any reported case in which the point was raised, but the English law is in harmony with the theory of this brief as is shown by the Perjury Act of 1911, which was intended to *codify* existing law.* It provides (§13):

> "A person shall not be liable to be convicted of any offense against this Act, or of any offense declared by any other Act to be perjury, or subornation of perjury, or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false."

American Law.

The Supreme Judicial Court of Massachusetts has held in accordance with this view (*Comm.* v. *Douglass*, 46 Mass. [5 Metc.] 241). They said:

> "The defendant's counsel contends that the whole charge must be proved, either by two witnesses, or by one witness and by other independent evidence corroborative of his testimony. *It is admitted that such evidence is necessary to substantiate that part of the indictment which alleges that the crime of perjury was committed by the person therein named;* and in this respect no objection is made to the instructions of the court to the jury, and as to that part of the indictment, which charges the defendant with subornation of perjury, or procuring the commission of said crime, we think it

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* 1 and 2 Geo. V, ch. 6. It is entitled "An Act to consolidate and simplify the law relating to perjury and kindred offenses."

> very clear that the same rule of evidence does not apply" (p. 243).

The court below quoted from the opinion in *Commonwealth* v. Douglass (R., p. 133) as sustaining their (the contrary) view, but they eivdently overlooked the language which we have italicized. They overlooked the *important* fact that the crime of "subornation of perjury," so called, contains two elements, viz., (1) the subornation, and (2) the perjury actually committed, and thus they failed to observe the *distinction* the Massachusetts court made between (1) the degree of proof required to prove "that the crime of perjury was committed by the person therein named," and (2) the degree of proof required to prove the "subornation of perjury." The court below seems to have been *confused* by the phrase "subornation of perjury." They thought it was used by the Massachusetts court to connote the *entire* crime, whereas it is clear that it was used to indicate only *one element* of it.

We shall see a little later that it is this *same confusion* which is responsible for what little conflict there is in the law.

The Supreme Court of Georgia, in an opinion by Mr. Justice Lamar, held in accordance with the theory of this brief. He wrote:

> "The suborner's act is not committed by means of his oath, and one witness is sufficient to establish what he did. State v. Renswick, 88 N. W. 22. *It is, however, necessary to show that the person suborned did actually commit the crime of perjury, and as to that portion of the case the court properly charged that the general rule as to perjury would apply, and two witnesses, or one wit-*

> *ness and corroborating circumstances, would be necessary to establish the fact of perjury.* Comm. v. Douglass, 5 Met. 241; 2 Roscoe's Cr. Ev. 1079, 864" (*Stone* v. *State,* 118 Ga. 705, 717).

The Georgia Court of Appeals in *Bell* v. *State,* 5 Ga. App. 701, reasserted the rule. They stated it admirably, viz.:

> "The crime of subornation of perjury consists of two essential elements—the commission of perjury by the person suborned, and wilfully procuring or inducing him to do so by the suborner. The guilt of both the suborned and the suborner must be proved on the trial of the latter. The commission of the crime of perjury is the basic element in the crime of subornation of perjury. The code of this State, following the universal rule on the subject, prescribes the quantum of evidence required in proof of perjury. This rule is that to convict of this offense the fact of perjury must be established by the testimony of two witnesses, or by that of one witness and corroborating circumstances. Penal Code, §991. Of course, this rule applies only to proof of the fact alleged to have been falsely sworn to, and not to other ingredients which constitute the offense, such as the act of swearing and the giving of the testimony assigned as perjury * * *" (p. 703).
>
> "The second element of the offense of subornation of perjury, to wit, the fact of subornation, according to the Supreme Court in the case of *Stone* v. *State,* 118 Ga. 717 (45 S. E. 626, 98 Am. St. R. 145) stands on an entirely different footing. 'The suborner's act is not committed by means of his oath, and one witness is sufficient to establish what he did.' *In other words, while*

> *the offense of perjury must be shown by two witnesses, or one witness and corroborating circumstances, the fact that the person was suborned to commit the offense of perjury is sufficiently shown by the testimony of the suborned witness*" (p. 704).

The Supreme Court of Kansas has cited and approved what was said in *Stone* v. *State* (*State* v. *Wilhelm*, 114 Kan. 349, 353), though the precise point was not involved, since the falsity of the oath was there proved by *circumstantial* evidence —a method which does not involve the balancing of one oath against another (*People* v. *Doody*, 172 N. Y. 165, 172). Yet their dictum approving the reasoning of the Georgia court indicates their *instinct* in the matter.

The Supreme Court of Iowa, in *State* v. *Waddle* (100 Ia. 57), took the same view. That was a prosecution for *incitement* to commit perjury, i. e., it differed from a *subornation* case in that the perjury was *not* committed. They said:

> "It must be remembered, however, that in this case there is not one oath against another. Neither Lizzie Seadore nor any other person has ever made oath that Watts is the father of the child. If Lizzie Seadore had so sworn, by the procurement of the defendant, then the prosecution must have been under section 3937* *and the rule* [viz., the 'two witness' rule] *would apply, for there would be one oath against another*" (p. 60).

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* Iowa Code of 1873, § 3937; Iowa Code of 1924, § 13166, defining "subornation of perjury."

The Supreme Court of Delaware has ruled to the same effect.

State v. *Fahey,* 3 Pennew. 295.

The Supreme Court of Minnesota (*State* v. *Renswick,* 85 Minn. 19, 20) reached the result for which we contend, though on a different ground; the theory of the decision being that the perjurer and the suborner are accomplices as to the false testimony and the Minnesota statute requires an accomplice to be corroborated.

The foregoing are *all* of the American decisions which we have been able to find (with two exceptions in Missouri *contra,* which we shall discuss presently) which decide or assert *anything* on this point.

The first of these cases, cited and quoted by the court below (R., pp. 133-134), is *State* v. *Richardson,* 248 Mo. 563, a decision of the second division of the Supreme Court of Missouri. Examination of the opinion shows that a *number* of witnesses testified to facts showing the oath to have been taken falsely (pp. 566-567), so that whatever was said on the point was *dictum,* and unfortunately the defendant filed no brief in the Supreme Court, nor was he represented by counsel (p. 568). While recognizing that some decisions and text writers "hold or infer that as to the proof of the element of perjury the witness should be corroborated," the court reached a contrary view, saying:

> "He [the suborner] is not convicted of an offense occurring while he is under oath and testifying. The offense that he commits is virtually consummated before the witness gives his testimony. He is not charged with the giving of false testimony" (p. 571).

The court overlooked the fact, we believe, that the *false oath actually taken* is an *essential part* of the suborner's offense, a fact so plainly pointed out by the Georgia Court of Appeals in *Bell* v. *State, supra,* and so clearly recognized by the cited decisions from Massachusetts and Iowa. The suborner's offense is not "virtually consummated before the witness gives his testimony," becaue unless the witness *does* give false testimony the offense of "subornation of perjury" is *not* committed. Whether it be the perjurer or the suborner that is prosecuted the state must prove as an *essential part* of its case the *oath* of the person suborned, and if but one witness asserts that oath to have been false, the "oath against oath principle," which is at the basis of the rule, inevitably asserts itself.

U. S. v. *Wood*, 39 U. S. (14 Pet.) 430, 438, 439.

4 *Wigmore on Ev.* (2nd Ed.), §2040.

The same court recently cited and followed *State* v. *Richardson* without making any new analysis of the merits (*State* v. *White*, 263 S. W. 192, 194).

In addition to this decision of the Supreme Court of Missouri, the court below referred to two federal decisions and three text book declarations. We shall now examine them.

U. S. v. *Thompson*, 31 Fed. 331 (R., p. 131). Judge Deady, in writing that opinion, did not have in mind this rule of evidence at all. That is shown by the head-note which *he* wrote, saying *nothing* about it. Not once in the opinion did he mention it. He discussed only the rule dealing with the sufficiency of the uncorroborated testimony of *ac-*

complices. He decided that the perjurer is not an accomplice of the suborner. Whether he decided that question properly is immaterial here, and was *obiter* there, because the court found "on the evidence of Shepered, *which is corroborated by that of the defendant at every turn*, it is clear that the former committed perjury" (p. 335). But whatever the court *said* was addressed to the *accomplice* rule, and not to the *perjury* rule.

Boren v. U. S., 144 Fed. 801 (R., pp. 131-132). The point was not involved, because there was corroboration. The court wrote:

> "If corroboration of testimony of the witnesses in this case as to their perjury in making the oaths was necessary, we find corroboration in the evidence which is in the record" (pp. 805-806);

where just preceding that the court wrote:

> "The reason of the rule in the form in which it is expressed does not apply to cases of subornation of perjury such as the present case for the reason that where the testimony does not consist of oath of one person against that of another"

it was thinking of proof of the act of subornation, and not of the falsity of the testimony. This is plain. It is shown not only by the language, but *by the reason given.* Proof of the act of subornation does not involve "the oath of one person against that of another," but proof of falsity does. The court was using the term "subornation" in the same limited sense in which it is used in the Massachusetts and Georgia decisions.

The quotations from *Wigmore on Evidence* and 2 *Bishop Crim. Law* (R., pp. 130-131) cite nothing but *State* v. *Richardson, supra,* and are entitled to no more weight than that single decision, opposed as it is by every other decision in the country. The matter quoted from *Bishop* was not in that learned writer's text, but was inserted by the editors of the 9th Edition, and is but a condensation of the opinion in *State* v. *Richardson*, which alone it cites.

The quotation from 30 *Cyc.* 1454 (R., p. 131) was intended to apply to proof of *subornation* rather than to proof of *falsity.* This is shown by the authorities it cites, viz., *State* v. *Waddle, Kahn* v. *Douglass, State* v. *Renswick, Boren* v. *United States* (all discussed above) and *U. S.* v. *Thompson* (also discussed), which is clearly out of point. Not one of these cases decides that although an uncorroborated witness is insufficient on the issue of falsity as against the perjurer he is sufficient as against the suborner.

To summarize, a careful search of all of the authorities both in England and the United States reveals that every time this point has been raised (until the decision below), it has been decided in accordance with the theory of this brief, with the single exception of the two decisions of the State of Missouri. The weight of evidence is clearly against the decision of the court below. Good reason is against it. The rule of proof ought not to depend on the *name* by which the prosecution is called. The *nature of the problem* is the thing which ought to control. And when that problem requires proof that an oath has been falsely taken, the law insists that such falsity be proved by something better than the oral testimony of a single

witness. We are not now concerned with the history of the rule. It is firmly fixed in the law. Whatever may be said in criticism of it, practical results founded in experience seem to justify it (4 *Wigmore on Evidence* [2nd ed.], sec. 2041). So whether the prosecution be called one for "perjury," or whether it be called one for "subornation of perjury"—which, as we have seen, is precisely the same thing—part of the problem is, was an oath *falsely* taken? The rule is that that problem *whenever met* requires for its solution better proof than the mere say-so of one man.

(B) *The importance of the question.*

The rule is of such importance to prosecution for subornation of perjury that it is certain to arise again and again. The fact that the precedents are not more numerous can only be because the application of the rule has seldom been challenged. Certainly that explains the fact that there seems to have been nothing written in England on the subject until the law was codified in 1911.

The decision below is the first definite *precedent* in the federal courts. It makes *new law*. It *upsets* a generally accepted rule. The point is one which, by its nature, cannot fail to arise many times. With this *precedent* on the books, with practically all the state decisions opposed to it, confusion is certain to result in the District Courts until the point be finally determined. Sooner or later this court will have to decide it. It will save much confusion if it be done now.

(C) *The point is necessarily involved.*

The point was raised by motion to acquit at the end of the government's case and again at the end of the whole case (R., pp. 61, 63), and by request for a definite instruction, all denied over exception and by exception to an instruction to the contrary (R., pp. 76, 77).

The errors are assigned (R., pp. 107, 111, 112).

III.

Whether this prosecution must be considered as one for subornation of perjury, as the trial court ruled it to be, or whether it can be regarded as one for the different offense of false swearing in bankruptcy, the exceptions discussed in the preceding point require the judgment to be reversed.

The trial court ruled that the prosecution was one for subornation of perjury (R., pp. 74-75). The Circuit Court of Appeals, as its opinion between pages 125 and 128 show, took the same view. This being so, we do not believe the record can be examined now to determine whether the indictment states and the evidence shows the *different* offense of false swearing in bankruptcy.

U. S. v. *Staloff*, 260 U. S. 477, 481.
San Juan Light & Transit Co. v. *Requena*, 224 U. S. 89, 96-97.
United Press v. *New York Press*, 35 App. Div. 444, affd. 164 N. Y. 406.
3 *C. J.* 718, 723.
17 *C. J.* 203.

But if we err in this, the exceptions discussed in the preceding point are decisive nevertheless. The rule that the falsity of the oath must be proved by something better than the uncorroborated testimony of a single witness applies, and for the same reasons in prosecution for false swearing as well as in prosecution for perjury.

Regina v. *Browning*, 3 Cox. C. C. 437, 438.
Aguierre v. *State*, 31 Tex. Cr. 517.
Comm. v. *Davis*, 92 Ky. 460, 462.

CONCLUSION.

The writ of certiorari should issue.

Dated, March 13, 1925.

Respectfully submitted,

ROBERT H. ELDER,
Counsel for Petitioner.

Notice of Submission.

PLEASE TAKE NOTICE that the foregoing petition and brief will be presented to the Supreme Court of the United States, at the Capitol, in the City of Washington, D. C., on the 23rd day of March, 1925, at the opening of court on that day, or as soon thereafter as counsel may be heard.

Dated, March 13, 1925.

Yours, etc.,

ROBERT H. ELDER,
Counsel for Petitioner.

Service of the foregoing is admitted the 16 day of March, 1925.

JAMES M. BECK

Solicitor General.